monthly rent from $31.50 to $50. Counsel for the plaintiffs very fairly conceded that it was a reasonable and proper inference for the Court to draw from the evidence given by the plaintiffs' witnesses that the Board had not made an order authorising the increased rent but he strenuously maintained that there was no evidence before the Court that the rent of $50 per month was in excess of the standard rent for these premises. He stated, and counsel for the defendant, as I understood him, did not dissent, that cases do occur, admittedly rarely, where the standard rent is higher than the current rent due to some abnormal arrangement made during the Japanese occupation, and, therefore the Court should not presume that every increase in rent was necessarily an increase in excess of the standard rent. There is considerable force in this contention, assuming, as to which I am doubtful, that I can have regard to general statements of this kind relating to standard rents in exceptional cases, but it seems to me it is not necessary for the plaintiffs to rely upon this particular argument. The proposition which the plaintiffs have to establish is that the Court has got all the material evidence before it and it appears to me that the most convincing argument in support of this proposition is that, after the close of the plaintiffs' case, defendant's counsel asked for it to be re-opened to enable him to adduce further evidence, by means of cross-examination of the plaintiffs' witnesses, in order to establish the alleged illegality. It is clear that he did not think that all the material evidence on this point was before the Court and I also am of that opinion. As Lord Parker said in *North Western Salt Co. v. Electrolytic Alkali Co., Ltd.*[2] (*ibid.* p. 478), the Court ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence. In the present case, so far from being certain that all the requisite material is before the Court, I am quite clear that essential evidence is missing. The defendant might have ensured that it was available if he had amended his defence and called evidence as to the circumstances in which the increase was made, in particular, if he had exercised his right under section 6 of the Ordinance and required the plaintiffs to furnish him with a statement of the standard rent and had produced that statement in evidence. Whether such further evidence if it had been given would have established the alleged illegality is a matter on which I need not speculate. It is sufficient to say that it is the defendant's fault that this material is missing and he must take the consequences. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Rodyk & Davidson.*

LIM KHENG KOOI & ANOR. v. REG.

[A. Cr. J. (Shepherd J.) June 29, 1957]

[Penang — Criminal Appeal No. 16 of 1957]

Prevention of Corruption Ordinance, 1950 — Persons charged with corruption and abetment of corruption — Joint trial — Prima facie case — Mens rea — Meaning of corruptly — Criminal Procedure Code (Cap. 21), s. 182(d) and (f).

This was an appeal against the conviction of the first appellant on three charges of corruption and of the second appellant on charges of abetment of that corruption. The appellants were tried together. The principal ground of appeal urged on behalf of the appellants was that the learned President of the Sessions Court was wrong in calling on the appellants to enter on their defence as no *prima facie* case had been shown against them at the end of the prosecution case. It was also urged on behalf of the second appellant that the learned President was wrong in not granting the application of the appellants for a separate trial.

Held: (1) as the learned President found that there was a *prima facie* case against the first and second appellants, he was not wrong in calling upon them to enter on their defences;

(2) the learned President had a discretion whether to order a separate trial or not and in the circumstances of the case the exercise of the discretion in refusing separate trials did not result in any miscarriage of justice.

Cases referred to:—

(1) *Soo Sing & Ors. v. Public Prosecutor* (1951) M.L.J. 143.

(2) *R. v. Power* (1919) 1 K.B. 572.

(3) *R. v. Abbott* (1955) 2 Q.B. 497.

(4) *Saminathan & Ors. v. Public Prosecutor* (1955) M.L.J. 121.

(5) *Public Prosecutor v. Lee Pak* (1937) M.L.J. 265, 267.

(6) *Trial of Rattenbury & Stoner,* Notable British Trials Series, (1935) p. 250; noted at (1955) Cr. L.R. 465.

(7) *Bradford Election Petition* 19 L.T. 723.

(8) *R. v. Grondkowski* (1946) 1 All E.R. 559.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ramani (*Ng Ek Teong* and *S. Thillaimuthu* with him) for the 1st appellant.

Eusoffe Abdoolcader for the 2nd appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Shepherd J. : — This is a joint appeal by Lim Kheng Kooi and Ramanathan Chettiar against conviction recorded by the learned President of the Sessions Court sitting at Penang on the 1st March, 1957 under section 3(b) of the Prevention of Corruption Ordinance, 1950. The 1st appellant was charged with the principal offence in each of three charges of corruption; the 2nd appellant was charged with abetting each of those offences respectively. The appellants were tried together.

At the trial the 1st appellant, himself a barrister of considerable note in Penang, conducted his own defence; and at the hearing of the appeal before me on the 5th June, 1957 and subsequent days he had the advantage of the services of Mr. Ramani, eminent counsel from Kuala Lumpur. The 2nd appellant was represented in the Court below and before me by Mr. Eusoffe Abdoolcader, whom I had occasion more than once to congratulate on the able and pertinacious way in which he had conducted the case first before the learned President and then before me on appeal.

The trial was curious in some ways not only because there were three charges laid under this section but because the charges concerned in each case the alleged corruption of an agent in connection with his principal's affairs, such principal being a private employer living in India who at no time lodged a complaint with the Police regarding the events which led up to the trial. Indeed, the trial would never have taken place but for certain proceedings before a Disciplinary Committee set up under the Advocates and Solicitors Ordinance, 1947, which proceedings, for reasons which are concealed from me, were never allowed to be put in evidence.

The section under which the accused persons were both charged reads as follows :—

"3. (b) If any person corruptly gives or agrees to give or offers any money, gift or other consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the commencement of this Ordinance done or forborne to do, any act in relation to his principal's affairs or business . . . . . he shall be guilty of an offence and be liable on conviction to imprisonment of either description for a term not exceeding three years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine."

Another curious circumstance, which dominated the hearing of the appeal from beginning to end so far as I was concerned, was the fact that it was on the record from the outset that both accused objected to a joint trial. I shall deal with this in greater detail later; suffice it to say that the 1st accused did not urge in his petition that the failure to grant a separate trial prejudiced him in his defence and Mr. Ramani who (with special leave) was permitted to argue further grounds of appeal did not include this matter and did not urge the matter in argument.

I shall not recite the charges, which are upon the record for those who want to read them, and I shall not recite in full the grounds of appeal filed on behalf of the two appellants. These together with the respective petitions ran to 5 pages in the case of the 1st appellant and 8 pages in the case of the 2nd appellant, the 2nd appellant setting out no fewer than 27 grounds.

The case is not really as difficult or complicated as these lengthy documents would suggest; nevertheless, there are points of difficulty, even of unusual difficulty, some of which sprang from the sparsity of the prosecution evidence and some from the fact that the application made at the outset of the trial for separate trials was refused by the learned President.

The facts briefly are that the 1st appellant, a barrister with a considerable practice and a long connection with the firm of Chettiars of whom the 2nd appellant was, if not a member, at least an agent, was in financial difficulties during the early months of 1955. On the 17th March, 1955 there came into his possession a cheque for $5,000 made payable to him, this being in respect of a deposit by his client one A.M.K.M.K. Karuppan Chettiar absent in India, and

made by the last named person in connection with an appeal to the Privy Council. The appeal had been concluded and an outstanding item of costs paid and the deposit thus fell to be returned. The main prop of the prosecution case rests on the evidence of P.W.8, one Vallipuram Nagaratnam, who had been a clerk in the employment of the 1st accused for some seven years. He knew of the financial difficulties of his employer and what he did he undoubtedly did with his eyes completely open. On the 18th March, the day after the cheque had been received, this witness was asked to go and see the 2nd accused and "fix up a loan for him (Lim Kheng Kooi)". The witness said :—

"I went to see 2nd accused and told him 1st accused wanted to borrow the money for 3 weeks. 2nd accused agreed."

The witness continued :—

"About 8th of April, 1955 Mr. Kheng Kooi called me to his room and he said he could not make payment yet. He gave me $100 and asked me to go and see 2nd accused and ask for an extension till the end of the month.

Mr. Kheng Kooi asked me to give the $100 to the 2nd accused. 1st accused said the $100 was for interest.

I went to 35, New Lane and met 2nd accused. I gave him the $100 and asked him for an extension of the loan till the end of the month. 2nd accused gave the extension till the end of the month."

This related to the first payment and the witness continued to give evidence of two further payments — one at the end of April when apparently the 2nd accused "had to be persuaded", as he did not give the extension willingly — and of a third payment given two or three days later. The evidence of this third payment was indirect. The witness said :—

"Then 2 or 3 days later 1st accused told me that he had seen the 2nd accused and had paid him another $100. 1st accused said he had seen the 2nd accused himself on his way to the office. I was not present with them."

The worthy clerk, whose evidence appears to have greatly impressed the learned President as being evidence of the truth, made no secret of the fact that Mr. Lim Kheng Kooi, his employer, told him that the money was in respect of interest; and it is quite true, as subsequently appeared, that some semblance of plausibility can be given to the story that these payments were in respect of interest by calculations made at the rate of 2% per month on the outstanding amount of $5,000 which, incidentally, is 24% per annum, or 33 1/3% more than is approved by the Moneylenders Ordinance in respect of unsecured loans. (By "approved" in this context I mean that any excess may in certain circumstances be regarded by the Court as excessive). This witness also gave evidence of certain events concerning a post-dated cheque and finally gave evidence on re-examination of a fourth payment of $100 this payment not being the subject of any charge. (The objection to this in the appeal was, in my view, of no substance : I refer to this in greater detail below).

The significance of the post-dated cheque was alleged by the prosecution to be relevant to this extent. On the 31st May, 1955 a cheque was given in settlement of the loan but was post-dated to the 6th June, 1955. The cheque was dishonoured and this led to a loss of temper or, to put it in another way, to complete desperation on the part of the 2nd accused; led to steps being taken to inform the Bar Committee and led ultimately to events which gave rise to the present proceedings. The evidence was also held by the prosecution to be relevant in connection with the case against the 2nd accused, with which I will deal in a moment.

The case against the 2nd accused rested not only upon the evidence of P.W.8, Vallipuram Nagaratnam but upon the evidence of two witnesses, one of whom Mr. Sonni Pillai, at that time a practising barrister, has been aptly described by the learned Deputy Public Prosecutor as "the key man" in this case so far as the 2nd accused is concerned.

Shortly the case against the 2nd accused was that he received these payments not as interest but as bribes — as a reward or as an inducement for agreeing to a loan of money which belonged not to him but to his employer without the knowledge and consent of that employer. According to the prosecution, the bribes or rewards were given expressly to prevent knowledge of these events reaching the principal of the 2nd appellant in India.

The case against this appellant also rested largely on the evidence of P.W.8 (Vallipuram Nagaratnam), the lawyer's clerk; but there was also the other evidence introduced by the prosecution in the form of the evidence of the aforesaid Mr. Sonni Pillai (P.W.9)

and his former clerk, M. Kanagaratnam (P.W.10). According to Mr. Sonni Pillai, when the 2nd appellant called towards the end of these events and wanted to collect from him the balance of the debt owing by the 1st accused, he (the 2nd appellant) was in a hurry and he said that he wanted the balance of the money before his principal arrived here; he added that his principal was returning from India. Then Mr. Sonni Pillai said :—

"I understood that the principal had no knowledge of this loan."

and when re-examined by the learned Deputy Public Prosecutor he is recorded to have said :—

"2nd accused had two reasons for being in a hurry. Firstly the loan was very much overdue. Secondly his principal was coming back soon from India and the principal did not know about this. 2nd accused volunteered the above information to me."

He is also recorded to have said when cross-examined by the 1st accused :—

"2nd accused did tell me that he had agreed with 1st accused that 1st accused could use the money."

P.W.10, Mr. Sonni Pillai's clerk, corroborated some of this evidence.

Now the question I have to decide is whether at the end of the prosecution case there was sufficient evidence to warrant a conviction of each accused on the supposition that such evidence was unrebutted.

Before dealing with this question, which is of importance from the point of view of both appellants, since if there was no case against the 1st appellant the case against the 2nd appellant must necessarily fail, I must consider the terms of section 182(f) of the Criminal Procedure Code. This in my view must be read in conjunction with sub-section (d) to which it refers and in conjunction also with the consideration that this is, as its name implies, a procedural code laying down not the law but the procedure to be followed in criminal matters. All the provisions of the Code must, in my view, also be read in conjunction with the provisions of section 448, which manifestly sets out to provide that irregularities should not vitiate proceedings unless they shall have occasioned a failure of justice.

The two sub-sections I have referred to read as follows :—

"(f) if upon taking all the evidence referred to in paragraph (d) the Court finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Court shall record an order of acquittal;

(d) when the Court thinks it necessary, it shall obtain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before itself such of them as it thinks necessary;"

It is clear, I think, that sub-section (d) merely contains a direction as to what the Courts should do in those cases to which the sub-section has referred namely, cases in which in the absence of any prosecutor apart from the complainant the Court obtains information from the complainant himself and calls appropriate witnesses. Sub-section (f) then gives directions as to what is to be done when it appears that there is no case for the accused to answer. No attempt has been made to lay down any axiom of substantive law, but what the extent of such law is or may be is, of course, clearly implied in an incidental way by the terms of the sub-section so often quoted as laying down that law. The axiom applicable is, of course, from the common law and is simply this : that a man is presumed innocent until proved guilty.

Reference was made by learned Counsel for the 1st appellant to the case of *Soo Sing & Ors. v. Public Prosecutor*[1] a case with which as a matter of fact in its earlier stages I had something to do as Deputy Public Prosecutor. Mr. Justice Abbott showed me the reference he proposed to make and we agreed that it was desirable for the matter to be settled by the Court of Appeal; and thus it came about that this judgment was issued. The judgment relates *inter alia* to section 173(f) of the Criminal Procedure Code of the Federated Malay States which, in my opinion, is not quite *pari materia* with the sub-section which I am now considering. The sub-section is not linked with just one preceding sub-section as in the sub-section in the present case and is thus, perhaps, a trifle wider in its application. It refers to all prosecutions in the Magistrates' Courts, not only those in which there is no prosecutor apart from the complainant. In other ways it is comparable. However that may be, the Court referred to the case of *The King v. Power*[2] and held that this case was not applicable in

the Magistrates' Courts in the Federation of Malaya. Now this case, it is now plain, has been somewhat misunderstood. In so far as it appeared to lay down or purported to lay down that if there was no evidence (not, be it noted, merely insufficient evidence) to convict at the end of the prosecution case but upon a review of the whole evidence the conviction did not result in an injustice the conviction should not be quashed, the decision was clearly *obiter* since the Court quashed the conviction quite manifestly on other grounds, namely that there was misdirection and non-direction by the learned Commissioner in his summing-up. The case is in fact most briefly and inadequately reported as has been pointed out by Lord Goddard C.J. in *Regina v. Abbott*[3]. In fact in a contemporary report (The Times Law Reports) the point was not reported at all, except in the headnote and in the description of certain interjections by Darling J. in the course of the argument, statements made apparently in a deliberately *obiter* fashion. But in the Times Law Reports' version of the case the reported judgment only dealt with the summing-up with regard to which the strictures of Darling J. were as harsh as any I have ever read anywhere. He said :—

"After serious discussion with my brother Judges, I wish to say that we are at a loss to find forensic expressions to convey our view how bad this summing-up was. This is not the first time that we might have spoken in this way of the learned Commissioner who tried the case. The result is that the conviction must be quashed, although we are not satisfied that the appellant was not as bad as Lewis. Indeed, perhaps he was worse."

It will be seen, therefore, that the Court was in no mood to consider academic arguments on *prima facie* case except in an *obiter* fashion.

To return to *Abbott's case,* Lord Goddard L.C. observed :—

"It is then said that **Rex v. Power**[2] has given a different interpretation to section 4 of the Criminal Appeal Act. There is no question that in *Power's case* a submission had been made on behalf of an appellant to the Commissioner at the Central Criminal Court which he overruled. Both prisoners went into the witness-box; one prisoner gave evidence against the other, and certainly supplied a great deal of evidence against the appellant. The Court in that case actually quashed the conviction on the ground that the summing-up was entirely defective and had not put the appellant's case to the jury at all. That was the decision of the Court, and it is rather remarkable that in the report in **The Times Law Reports** ((1919) 35 T.L.R., 283) that is the point which is reported, the point concerning the giving of evidence by one prisoner against the other not being dealt with at all. But what the Court desires to point out with regard to *Power's case* is this: the Court was not pronouncing upon whether the Judge ought to have stopped the case at the end of the case for the prosecution; and it is observable that Mr. Eustace Fulton, arguing for the Crown, submitted that there was some evidence given by witnesses for the prosecution: 'There was evidence given by witnesses for the prosecution that some of the stolen property was found in the possession of the appellant'. Whether the Court was dealing with the case on the footing that there was no evidence against Power, we do not know."

Abbott's case[3] explaining *Power's case*[2] is thus merely authority for the proposition that if there is no evidence, as distinct from some or insufficient evidence, against the accused at the end of the prosecution case, then at that stage he, the accused, is entitled to walk out of the dock a free man.

This case will, I imagine, be regarded as good authority by all Courts in this country; and *Soo Sing's case,* which (some will say) goes further, will be followed so far as all trials before Magistrates are concerned. The decision of the Court of Appeal in that case may be epitomised in the words of Foster-Sutton C.J. at page 143, as follows :—

"Section 173 of the Criminal Procedure Code lays down the procedure to be followed by Magistrates in summary trials. The 'evidence hereinbefore referred to' in paragraph (f) of that section has reference only to the evidence given for the prosecution. That being so, it is the duty of a Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt."

It may be implied that if the Magistrate's decision is in the negative, the accused is entitled to walk out of the Court a free man. The decision is of application here as, though the corresponding sub-section is of more limited application, it may be and perhaps should be applied by way of analogy. It is not necessary to consider whether *Soo Sing's case* applies to trials other than those before Magistrates; but I should like to try to understand what the case really means. The Court used the phrase "reasonable doubt" but unfortunately it has not told us exactly what is meant by this phrase; and after reading the brilliantly analytical judgment of Buhagiar J. in *Saminathan & Ors. v. Public Prosecutor*[4] and reading the learned article (printed at page 464 of 1955

Criminal Law Review) by Glanville Williams, Quain Professor of Jurisprudence in the University of London, I am left with the conclusion that the position is still as explained by Whitley Ag. C.J. in *Public Prosecutor v. Lee Pak*[5] when he said in terms which I, with respect, adopt for the purposes of this case and which I regard as almost classical :—

"Magistrates should bear in mind that in order to entitle them to call upon the defence it is not necessary that the prosecution should have made out an unanswerable case. It is sufficient if they have made out a *prima facie* case which calls for an answer, and which it is necessary for the accused to rebut."

To put it shortly, whether in considering an application of no case or in reviewing the whole case at the end of the trial the Magistrate simply has to make up his mind whether he is satisfied that the prosecution has made out its case. He is not allowed to guess.

The trouble, in my view, arises fundamentally from the view that "warrant" is synonymous with "compel". After deciding that the evidence warrants a conviction and in the absence of further rebutting evidence, a Magistrate or Judge (they perform the same function) may acquit having conjured up what seems to be at that time a reasonable doubt apparently (some would say) from his subconscious mind; and although juridically such action may be open to attack no one could say that he has acted improperly. He has simply attempted to weigh the imponderables and to give effect to what Buhagiar J. has referred to in *Saminathan's case* as the rule of prudence rather than the rule of law. As to the meaning of "reasonable doubt" in the context in which it is usually found I would respectfully adopt the words of Humphreys J. in the trial of *Rattenbury and Stoner*[6], reported at page 465 of 1955 Criminal Law Review, when he said :—

"I never think myself that that expression adds anything to the law as I have stated it to you, for what must be done is to prove a person's guilt, and if there is reasonable doubt about the matter, the case has not been proved at all, and if the case has been proved the English language is clear enough to make it obvious that what is meant is that it has been proved beyond reasonable doubt."

I can see no difference between establishing a case beyond reasonable doubt and establishing a *prima facie* case; the terms are synonymous, only the context is different. The former expression is normally used at the end of the whole case, whereas the latter at the conclusion of the prosecution case, implying simply that there may be more evidence to come. Otherwise the tests are the same and simply embody the statutory definition of "proved" in section 3 of the Evidence Ordinance. In saying this I am attempting to adapt the dicta of Buhagiar J. in the case just quoted to the present case. I shall, of course, apply this case (*Abbott's case*[3]) as far as it goes and I shall also attempt to apply *Soo Sing's case*[1] which, as I have explained, is really *Lee Pak's case*[5], in a modern guise.

But *Abbott's case* also concerned a joint trial— a trial in which two accused persons, a man and his woman secretary, were indicted together for forgery and tried before a jury. At the end of the prosecution case it was clear that the whole substratum of the case against the man had collapsed, but the Judge allowed the trial to proceed and, although observing to the jury that "the formation upon which Sir Godfrey Russell Vick opened the case against Mr. Abbott has crumbled completely away and there is nothing left of it," he left the question of guilt to the jury and they convicted.

The importance of the case from my point of view is that it seems to me that the learned President in the present case might possibly have been tempted to approach his decision on the same basis as that wrongly adopted by the learned Commissioner in *Abbott's case*[3]. This basis is well explained by Lord Goddard C.J. in the following terms :—

"If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it is left to the accused persons to get out of it if they can, that would put the onus upon them to prove themselves not guilty."

Throughout my consideration of this appeal I will have this dictum in mind, because it has, in my view, particular relevance to the present case, at least obliquely.

For the moment, however, I am concerned with the question whether the 1st accused or the 2nd accused, or both, should have been allowed to walk out of the dock as free men at the end of the prosecution case, applying the above tests.

I have referred to the evidence against the 1st accused and have indicated that it was, in my opinion, sparse. P.W.8 (Vallipuram Nagaratnam) is the only person who gives direct sworn evidence implicating the 1st accused. Here I would say at once that it is not quite true that his evidence about the payments, in

several of which he took part, was that they were payments for interest. What he said was that he was told that they were payments in respect of interest: quite another thing. In this respect I think that the third additional ground of appeal lodged on behalf of the 1st appellant must fail.

Now the learned President directed himself that P.W.8 (Vallipuram Nagaratnam) was an accomplice. I will not here go into the question as to whether P.W.8. was or was not an accomplice, but I will merely observe that if he was and it imports some evidence that he was *particeps criminis,* which is by no means clear, then the learned President was right in so directing himself. He clearly asked himself whether or not there was any other corroborative evidence such as to justify him in accepting the evidence of P.W.8, with all its necessary implications. On this issue the learned President simply states :—

"Though P.W. 8 could be considered as accomplice, I warned myself against the danger of accepting parts of his evidence without corroboration. He was quite an old and a nervous person but he appeared to me to be speaking the truth. Whatever he did, he did to carry out the instructions of his then employer. I accepted his evidence."

He then went on to refer to the fact that he was satisfied that the 2nd accused, the Chettiar, visited the office of the 1st accused, the lawyer, on the afternoon of the 18th March, 1955, no doubt because this part of P.W.8's evidence was corroborated by P.W.7 (Leong Weng Choon). For myself I should have preferred the statement marked "I", being a statement made by the 1st accused after caution to P.W.1 (Mr. Harries, the Officer-in-Charge of Criminal Investigation), as corroborative evidence. This was admitted as Exhibit P.8 and in it the 1st accused corroborated the testimony of P.W.8 (Vallipuram Nagaratnam) in a material particular, namely, in respect of the "various payments of $100". In this statement the 1st accused said :—

"When I gave him the various payments of $100, amounting in all to $400, I was really calculating on the basis of 2% per month interest."

P.W.8's evidence then is corroborated to a certain extent by P.W.7's evidence (with regard to the visit of the Chettiar to the lawyer's office on the 18th March, 1955), but more particularly by the statement taken by P.W.1 from the 1st accused himself and admitted in evidence as part of the prosecution case. I hold, therefore, that the learned President was not wrong in calling upon the 1st accused for his defence.

The evidence against the 2nd accused was, in my view, stronger, since the prosecution also led the evidence of Mr. Sonni Pillai (P.W.9) and his clerk (P.W.10), which evidence, incidentally, was not admissible against the 1st accused. I say "incidentally"; but perhaps I should give this more emphasis. I was particularly anxious in reading the grounds of judgment of the learned President to determine whether or not he had allowed this evidence to weigh with him in deciding the question whether or not to call upon the 1st accused for his defence. He makes no reference to it in this context; but he does refer to the evidence of Mr. Sonni Pillai and he refers to it only once in the context of the case against the 2nd accused, which is entirely proper (see page 100 of the record where the learned President says: "I believed the evidence of Mr. Sonni Pillai as corroborated by his clerk, and from their evidence I was satisfied that 2nd accused had in fact received certain sums which 2nd accused called 'interest', because calling it by the proper name would be embarrassing"). Whether or not it did unconsciously weigh with him in deciding the prosecution case against the 1st accused I nevertheless held that there was sufficient evidence to call upon the 1st accused for his defence. So also, *à fortiori,* in connection with the 2nd accused.

Before leaving this aspect of the question, however, I must touch upon the question of *mens rea.* I have not dealt with it before because I should have thought it obvious that in the circumstances of this case the learned President was perfectly justified in drawing an inference from the facts established by the prosecution at the close of their case that both accused had not acted innocently, but on the contrary with the necessary evil intention to bring the case within the provisions of the Prevention of Corruption Ordinance. The word "corrupt" is not defined in the Ordinance, nor is it defined in any other useful context so far as it has come to my knowledge, in this country, but reference was made quite rightly by Mr. Ramani to the case of *Bradford Election Petition*[7]. Martin, B. at page 727, is reported to have said :—

"But if the money is given after the man has voted, you must show that that was done corruptly. Now, what is the exact meaning of that word 'corruptly'. It is difficult to tell; but I am satisfied it means a thing done with an evil mind — done with an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done. And thus when the word 'corruptly' is used it means an act done by a man knowing that he is doing what is wrong, and doing so with evil feelings and evil intentions. I think it may be safely said that that is the meaning of the word 'corruptly' ".

Adopting that definition to the present case the learned President had to decide whether the evidence led by the prosecution gave rise to an inference of corruption. In this context the provisions of the Evidence Ordinance should be studied. A fact (according to section 3 of the Ordinance) is said to be "proved" when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. "Fact" means and includes any mental condition of which any person is conscious. Section 11 provides :—

"11. Facts not otherwise relevant are relevant—

(a) if they are inconsistent with any fact in issue or relevant fact;

(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

Section 14 provides :—

"14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant."

(The explanation should be read in conjunction with this section). Section 16 provides :—

"16. When there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done, is a relevant fact."

The sum total of all these sections is that the learned President was perfectly entitled to have regard to what is normally called "circumstantial" evidence. In this case the circumstantial evidence against the 1st accused was, in my view, compelling, though, of course, it was not evidence of such a sort that it was incapable of rebuttal. He was a lawyer of some considerable substance and of many years' experience; he had had dealings for years with this Chettiar firm and no doubt with other Chettiar firms. Although it was his plain duty to pay this sum of $5,000 into his client's account even if he was to negotiate a loan subsequently, he did not do so, which, I suppose, lends colour to the suggestion that he wanted to persuade the 2nd accused to keep the transaction out of the knowledge of the 2nd accused's principal in India. He asked for and received no receipt in respect of the various payments of alleged interest (and I suppose such receipts would have been necessary if he intended to claim these interest payments in his Income Tax Return): and he asked for and received no account in respect of the outstanding amounts of capital. All this led, in my view, to the irresistible conclusion that he was desperately anxious to keep this an entire secret between himself and the agent of his client. He did not want the Chettiar — the principal — in India to know. Upon any view he had given a bonne bouche, call it what you will, on four occasions in most irregular circumstances. The circumstances were so irregular that the learned President came to the conclusion, and I cannot disagree with him, that interest was simply an euphemism for "bribe".

With regard to the 2nd accused, I have already referred to the evidence of Mr. Sonni Pillai which, in itself, strongly suggests that he (the 2nd accused) was at one with the 1st accused (though he may have acted reluctantly in the first instance) in the determination to keep this transaction a secret between himself and the 1st accused. Whether the motive was compounded of generosity and kindliness towards the 1st accused as well as evil is immaterial; it contained an ingredient of corruption, since he wished to deceive his principal. That is the important point.

Those, to my mind, are the necessary implications, though they were, as I have said, of course open to rebuttal.

A consideration of what occurred subsequent to the close of the prosecution case discloses a remarkable state of affairs.

It is at this stage that it is relevant for me to consider what appears to me to be the only other substantial ground of appeal amongst all the numerous grounds argued before me. I refer to the 2nd appellant's first ground of appeal with which may be incorporated the second and third grounds. These read as follows :—

"(1) The learned President was wrong in refusing the application that Lim Kheng Kooi and the Appellant should be tried separately and in ordering a joint trial. The defences of the two accused were bound to incriminate each other, and the charges against each of them should have been tried separately and the interests of justice in this case required that course to be taken.

(2) That the joint trial gravely embarrassed and prejudiced the Appellant in his defence and resulted in a serious miscarriage of justice and is therefore a nullity.

(3) That by reason of the joint trial and the said Lim Kheng Kooi's election to make a statement from the dock the Appellant was precluded from cross-examining the said Lim Kheng Kooi and thereby denied an opportunity of seriously challenging and rebutting his allegations.

Such cross-examination would have proved that the said Lim Kheng Kooi had previously misappropriated clients' moneys, that he had on a previous occasion been struck off the rolls for committing such an offence, and that his evidence was utterly unworthy of credit."

It was made plain at the beginning of the trial by Mr. Eusoffee Abdoolcader for the 2nd appellant and Mr. Lee Thean-Chu, who was then acting for the 1st appellant (the 1st appellant later conducted his own trial) that a separate trial was desired by both parties; though, as I have said, the failure of the learned President to grant this application was not taken as a ground of appeal by the 1st appellant.

Section 179 of the Criminal Procedure Code is relevant. It reads as follows :—

"179. When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence or when one person is accused of the offence of theft or extortion or criminal misappropriation or cheating, or criminal breach of trust, and another of receiving or retaining or assisting in the disposal or concealment of the subject matter of such offence they may be charged and tried together or separately as the Court thinks fit and the provisions contained in the former part of this Chapter shall apply to all such charges."

I think it worth while quoting in full the following section from *Halbury's* Laws of England, 3rd edition, Volume 10 at page 415 :—

"760. **Trial of two or more defendants.** Where several persons join in the commission of an offence, all or any number of them may be jointly indicted for it and tried together. They should, however, be tried separately if the interests of justice seem to require that course to be taken. Whether two persons jointly indicted should be tried together or separately is a matter for the discretion of the Judge who must exercise it judicially.

Where an essential part of one prisoner's defence amounts to an attack on another prisoner the Judge is not bound to order separate trials, though he must take it into consideration in the exercise of his judicial discretion."

I also think it worth while at this stage quoting from the headnote in the case of *R. v. Grondkowski*[8] :—

"**Held:** (i) *prima facie* where the essence of the case was that the accused were engaged on a common enterprise it was proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be.

(ii) there was no rule of law that where it appeared that the essential part or an essential part of one accused's defence was or amounted to an attack upon another accused a separate trial should take place.

The law was, and always had been, that this was a matter for the discretion of the Judge at the trial, such discretion to be exercised judicially and not capriciously, both the interest of justice and the interests of the accused to be considered.

(iii) an attack by one accused on another was a matter which the Judge should take into account in considering whether to grant a separate trial, but he was not, in those circumstances, bound to grant a separate trial."

It is obvious that when an application of this sort is made, the Magistrate has to make an important decision. He is not gifted with powers of prophecy and he is not always quite certain the course the trial is likely to take. In the present case it is fair to say (see page 24 of the record) that Mr. Hume, then acting for the 2nd appellant, indicated that the 2nd appellant would deny all the admissions made by the 1st accused so far as they were admissions since those admissions would be evidence against the 2nd accused or might be evidence against the 2nd accused by virtue of section 30 of the Evidence Ordinance.

This statement of the intention to deny did not necessarily import into the case a situation in which one accused would make an attack upon another as the basis of his case. Or if it imported such a matter it seems to me to have been implied rather that the 2nd accused would attack the 1st accused than *vice versa*. In point of fact it is now the 2nd accused who complains that he was attacked and who takes the point that the refusal of the learned President to grant a separate trial caused an injustice. The 1st accused has let the matter go by default, although in considering the point I have attempted to bear in mind that an injustice might conceivably have been caused to him as a result of the learned President's decision. As the trial developed it became plain that far from the 1st accused making an attack against the 2nd accused he was, in fact, it may be said, providing the 2nd accused with a ready-made defence. The defence he was providing him with was that this was a genuine moneylending transaction between the two parties as a result of which *bona fide* payments of interest took place between one and the other. This defence did not commend itself to the 2nd accused and he decided to deny the fact that any such payments were ever made. Although at one stage of the argument I stated that I thought I was convinced that the 1st accused in insisting that payments were made had made up a covert attack upon the 2nd accused, after hearing the learned Deputy Public Prosecutor, I came to the conclusion that he made no such attack. As I have said above, if an attack took place by one upon the other then it was an attack by the 2nd accused upon the 1st accused in alleging that all the evidence relating to the alleged payments was completely false.

I now revert to the headnote in *Grondkowski's case* :—

". . . . . if improper prejudice had been created, whether by a separate or by a joint trial, the Court would interfere, but not otherwise; in this case the Court was satisfied that there had been no miscarriage of justice and the appeal, therefore, failed."

What I must now consider, therefore, is whether the exercise of the discretion reposed in the learned President has resulted in a miscarriage of justice. Was there, in a broad sense, a fair trial? It was urged on behalf of the 2nd appellant by Mr. Eusoffe Abdoolcader that the failure to provide separate trials deprived him of an opportunity in the lower Court of cross-examining the 1st accused. Here it should be noted that the 1st accused did not go into the witness box himself when the time came to enter upon his defence but made a lengthy statement from the dock, admitting the payments alleged, but urging that far from being bribes they were *bona fide* payments of interest. I asked Mr. Eusoffe Abdoolcader if he had invited the 1st accused to go into the witness box and submit himself for cross-examination, but he replied that he did not think it worth while; and he may well have been right, since obviously the 1st accused had no intention of being cross-examined by anyone.

However that may be and despite the fact that Mr. Eusoffe Abdoolcader was robbed of the opportunity of cross-examining him I was not convinced that this necessarily caused an injustice. It is highly problematical how a witness will react when submitted to cross-examination. Mr. Eusoffe Abdoolcader indicated that he proposed to put to the 1st accused if he went into the witness box that he had committed criminal breach of trust on previous occasions. The 1st accused might have denied this and, although I believe that he might well have been broken down in cross-examination on this point, does that necessarily imply that the prosecution evidence regarding the payments of the so-called interest, corroborated in part by the statement of the 1st accused from the dock, was false? I do not think so; and I do not see how it can be supposed that this opportunity of cross-examination, if provided would necessarily have changed the whole course of the trial. These grounds of appeal must accordingly fail.

As I have said, the course of the trial after the conclusion of the prosecution case was somewhat dramatic, since the courses adopted by the two accused in conducting their respective defences were in diametrically opposed directions. The effect of this upon any Court could not fail to have been disastrous to both accused. Whilst I agree that from that point onwards it must have been very difficult for the learned President to disentangle the evidence led in respect of the two accused, nevertheless he made the effort and, I think, succeeded.

The learned President has considerable experience as a Magistrate and, as with all Magistrates, has trained himself, if necessary, to keep the evidence in watertight compartments for the purposes of the trial. He came to the conclusion that the 2nd accused was a liar and that in attempting to establish an *alibi* several witnesse whom he produced had committed perjury or at least were extremely unreliable. The *alibi* which the 2nd accused attempted to establish was that he was never in the office of the 1st accused, the lawyer, but elsewhere on the 18th March, 1955, which was the date upon which (so the prosecution alleged) the original arrangement was made to allow the 1st accused to obtain his principal's money without his knowledge and consent. The fact that the learned President disbelieved the 2nd accused and his witnesses with regard to their version of the events must inevitably have confirmed in his mind the truth that the parties were acting in concert to commit the offence of corruption as particularised in section 3(b) of the Ordinance. With this conclusion it is very difficult to disagree and, although I did not have the advantage of seeing the witnesses in the box and thus cannot say what view I would have taken as to their credibility if I had done so, I see no reason to disagree with the learned President or to upset his finding.

I particularly asked the learned Deputy Public Prosecutor, in replying, to deal with the question as to whether there was evidence that the transactions were conducted without the knowledge of the principal in India. The inference that the principal had no knowledge was very strong from the evidence led by the prosecution; and I am convinced that it was confirmed at least in part by the correspondence which took place between the 2nd accused and his principal after the 2nd accused at last disclosed to his principal what had been going on. The fact that he so disclosed what had been going on was urged in favour of the 2nd appellant, but I think the inference is irresistible that he only made the disclosure when the incident of the post-dated cheque made such disclosure inevitable. The post-dated cheque, unlike the payments of the so-called interests would have been entered in the agent's books. It was dishonoured. Some explanation to the principal was inevitable. Hence on the 10th June, 1955 the 2nd accused wrote as follows :—

"Lawyer Lim Kheng Kooi was approached several times in his office to get the amount of $5,000 deposited in respect of Privy Council case, but every time he put me off saying he has many cases to attend to and hence he has no time and he would get it done next week; then he would say he would do it after 4 days. Later when I pressed him he gave me a cheque for $5,000 on

6.6.55. When the cheque was presented to the Bank to credit to Account it was returned saying there is no money in the Bank (to his credit)."

No reference, be it noted, to the loan or payment of interest. As may be expected the reply from the principal which is dated the 29th June, 1955 was in the nature of an explosion — "Why have we been duped?" Then the letter continued :—

"If he had dragged on the matter and if you had enquired from the Court as to whether the cheque had been given, then you would have immediately obtained the money from Kheng Kooi before the latter spends it. If you had enquired from the clerk in the Court on and off you would have known details of the cheque. How can you collect other money when you have been deceived to collect the money deposited in Court. Can you wait and see till the lawyer receives and takes the money? See that the money comes."

Then followed directions to threaten Lim Kheng Kooi and to get the money back without delay. I repeat, it will be noted that there was no reference to the payments of the so-called interest, which had clearly not been entered in the books. This inevitably suggested that the 2nd accused kept the knowledge of the loan from his principal in accordance with the concerted plan of the 1st and 2nd accused acting together to deceive his principal. It also made it inevitable (or so it seems to me) that he chose the line of defence he did, namely, a complete denial of all the payments that were made.

It is only necessary to deal with one further point and that is the evidence of the fourth payment, which came out as a result of the re-examination in the Court below of P.W.8 (Vallipuram Nagaratnam) by the learned Deputy Public Prosecutor, who was conducting the case. It has been urged that this was irrelevant and should not have been admitted. It was so urged at that time when the learned Deputy Public Prosecutor, who was conducting the case, submitted (and his submission succeeded) that it was admissible as going to disprove the allegation that the interest was calculated at a mathematically precise rate according to the number of days between each payment. In my view it also went to show a system and as such was properly admitted under section 6, possibly, and certainly under section 8 of the Evidence Ordinance.

There is also, according to the unsworn testimony of the 1st accused, the fifth payment also of $100. Four payments went to show system, but that was before the disclosure to the principal had been made known to the 1st appellant. After that he gave another $100 to the 2nd accused. The prosecution has accepted the fact that a fifth payment was subsequently made; or at least has not attempted to disprove it. What was the purpose of this? A present in anticipation of the 2nd accused's good offices in attempting to persuade Mr. Hume not to institute an inquiry? One does not know : but on one view, if true, it goes to wreck the prosecution's contention of system, but upon another view, which I think is the right one, it goes to confirm it. I find this matter of the fifth payment most important, even decisive in coming to a conclusion in the issue of *mens rea* in this case. Counsel did not address me on the point and the learned President only dealt with it incidentally in his grounds of judgment thus :—

"The 1st accused said (here follow a list of matters irrelevant for my purpose) that on the 26.9.55 late in the evening, he received a stiff letter from Messrs. Hogan, Adams & Allen, and so, early on 27.9.55 he went to see 2nd accused and gave him $100 on being assured that no proceedings would be taken."

The implication (which is perhaps unconscious) that the fifth regular payment of $100 was given as a further reward (or bribe) this time to prevent disciplinary proceedings being taken is obvious. I think it the right one.

The attempt to reconcile this fifth payment with a *bona fide* interest payment for a friendly loan was even more difficult than in the case of the fourth payment since it related to a period of two months instead of one month and a sum of $1,500 instead of $5,000 and, indeed, the attempt is really too specious to have any chance of success. In short to my mind it confirms my view that the payments were all *bonnes bouches,* presents, rewards, call them what you will, but in blunt reality bribes.

What has happened here then is what would happen if, wanting to enter a prohibited place, one handed the policeman at the gate $2 saying: "I would like to see round this place, Officer. Here is $2 to buy your little girl some sweets". One might persuade oneself afterwards — as no doubt the 1st accused has done — that one is perfectly innocent: that one would really like the policeman to buy his little girl some sweets. But what one has done, at bottom, is quite obviously to offer a bribe. Casuistry can lead on to self-deception which accounts for the curiously compelling nature of the 1st appellant's statement from the dock read purely as a statement in *vacuo* divorced from all the concomitants of a trial. The value of a trial is that it even uncovers self-deception. The above example is given simply to illustrate and emphasise the fact that, as in this case, corruption trials must always depend largely on circumstantial evidence. To conclude, the accused simply made a statement from the dock urging that the payments were *bona fide* payments of interest. This explanation the learned President did not accept. All one can say of the trial against the 1st accused,

therefore, is that the prosecution succeeded in establishing a *prima facie* case which the accused failed, according to the judgment of the President, to rebut. The fact that I or another Judge might have come to a different conclusion is beside the point. I see no reason for disturbing the President's decision. Similarly with the case against the 2nd accused, which was, if anything, more clearly established despite the course his defence took.

These appeals are accordingly dismissed.

Mr. Cooke, the learned Deputy Public Prosecutor, has just drawn my attention to the fact that I have wrongly construed the evidence and that in fact in all there were only four payments and not five, and the fifth payment referred to earlier in my judgment and made on the 27th September, 1955 was, in fact, what I have termed the fourth payment, which had been brought out in re-examination. This, however, does not alter my decision in the slightest. I regard this last payment (whether the fourth or fifth) as of such importance because it was made after the disclosure had been made to the principal in India. In other words it had been made after it had become clear to the 1st appellant that all the facts were already known to the principal and thus any purpose of continuing the series of *bonnes bouches* or bribes, if it was to keep the knowledge from the principal in India, was no longer well founded. I have thus tried to direct my mind to the question (which, I feel, is all-important) of what was the purpose of this further payment. On one view it went to break down the prosecution case that there was a system in the making of these payments (a system of giving bribes), but upon another view, which I believe is the right one, it only went to confirm it. I am obliged to Mr. Cooke for drawing my attention to the fact that I misconstrued the evidence on this point; but it makes no difference to my decision. (The evidence which misled me is to be found on page 42 — P.W.8 — and 54 — 1st accused).

Before disposing of this matter I think it necessary that I should turn my attention to the penalties which have been imposed. I take the view, with which others may or may not agree, that there would be less corruption if there was not present in this country, and particularly in the business community, persons ready to be corrupted. I also take the view that in many cases, and probably in this one, the person committing the offence is less blameworthy than the one abetting it, since very often the principal offender is in a grave difficulty (perhaps, it is true, through his own folly) — a difficulty from which he is striving desperately to escape. I also take into account the ruin in which the 1st appellant's career now lies. I think Courts should direct their minds to these points in deciding upon sentence and should (if they think fit) discriminate between one and another of persons jointly tried. In the present case I consider that discrimination should be made and I am inclined to support the proposition submitted on behalf of the 1st appellant by Mr. Ramani that so far as he, the 1st appellant, was concerned the separate crimes (although I would say at once quite properly charged as separate offences) were, from one point of view, one transaction. With regard to the 2nd accused he could at any time have escaped from the position in which he found himself by refusing to accept further payments.

I accordingly reduce the total fine to be levied upon the 1st accused to $750 or two months' imprisonment in default and give him three months in which to pay.

Appeal dismissed.

Solicitors: *S. Thillaimuthu; Ong Huck Lim & Co.*